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IN THE

Supreme Court of the United States

October Term, 1958

No. 204

MARY K. GIBRAN, as sole heir and next of kin of KAHLIL GIBRAN,

Petitioner,

—v.—

THE NATIONAL COMMITTEE OF GIBRAN,

Respondent.

—and—

MARY K. GIBRAN and WILLIAM SAXE, as Administrators C.T.A. of the Estate of KAHLIL GIBRAN,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above cause on April 25, 1958.

Opinion Below

The opinion of the Court of Appeals has not yet been reported; it is reprinted as part of the Appendix. The opinion of the District Court is reported in 153 F. Supp. 854, and is also set forth in the record, pages 153 to 167; it appears in the printed Appendix at pages 7a-18a.

Jurisdiction

The judgment sought to be reviewed was rendered and entered on April 25, 1958. No petition for rehearing has been filed, nor has the petitioner applied for an order extending the time within which to petition for certiorari. The jurisdiction of this court is invoked under 28 U. S. C. §1254(1).

The Questions Presented

1. Whether the administrators with the will annexed of a deceased author, or the sole heir and next of kin of that deceased author (to wit, his sister), have the right to obtain certificates of renewal copyright on the works of the author where the author died prior to the renewal year?

2. Assuming *arguendo* that the administrators c.t.a. are the proper persons to obtain certificates of renewal copyright, to whom, under the Copyright Act, should the said administrators c.t.a. distribute the renewal copyrights and the balance of accumulated royalties thereon?[1]

Statutory Provisions Involved

17 U. S. C. §24, insofar as pertinent, provides as follows:

> "The copyright secured by this title shall endure for twenty-eight years from the date of first publication, whether the copyrighted work bears the author's true

[1] If certiorari is granted, petitioner intends to argue that the Court below erred (even if the administrators c.t.a. have a right to renew, and are not required by the Copyright Act to distribute to the next of kin), because the author either died intestate as to the renewal, or if he did not die intestate, that he bequeathed the renewal to his sister, the petitioner here, or, if he bequeathed the renewal to the Town of Bechari, that bequest was adeemed.

name or is published anonymously or under an assumed name: *Provided*, That in the case of any posthumous work or of any periodical, cyclopedic, or other composite work * * * the proprietor of such copyright shall be entitled to a renewal and extension of the copyright in such work for the further term of twenty-eight years * * *: And provided further, That in the case of any other copyrighted work, * * * the author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright in such work for a further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright * * *."

17 U. S. C. §28 provides as follows:

"Copyright secured under this title or previous copyright laws of the United States may be assigned, granted, or mortgaged by an instrument in writing signed by the proprietor of the copyright, or may be bequeathed by will."

Statement

Involved herein are the renewal copyrights of several of the works of Kahlil Gibran. These renewal copyrights are extremely valuable. Thus, in the five and one-half years after the renewal copyright on "The Prophet," the most important book involved, came into effect, royalties on it amounted to over $100,000. This litigation will also be

determinative of the disposition of renewal royalties which will hereafter accrue on these works; such later accruing royalties are estimated at $500,000.

The parties herein are the following: Mary K. Gibran, the sole next of kin of the said Kahlil Gibran (hereafter called the "petitioner"); Mary K. Gibran and William Saxe, as administrators with the will annexed of Kahlil Gibran (hereafter called the "administrators c.t.a."); The National Committee of Gibran (hereafter called the "Committee"), representing the town of Bechari, Lebanon. Alfred A. Knopf, Incorporated, the publisher of said Kahlil Gibran, was originally a party hereto, but is no longer a party.

The relevant facts are not disputed, and were incorporated in a stipulation of facts and exhibits thereto (28a-34a; 19a-21a; 35a-68a).[2]

Kahlil Gibran died in New York on April 12, 1931, during the original copyright term of the published works here involved, and more than fourteen years before the earliest of his copyrights could be renewed (29a). The author was survived by neither a widow nor children (29a). His sister, Mary K. Gibran, the petitioner herein, was, at the date of his death, and still is, his sole next of kin (29a). He left an incomplete, obviously layman drawn will in which no executor was named (29a, 55a). After the will was probated, Mary K. Gibran and William Saxe qualified as administrators c.t.a. of his estate (29a).

The administrators c.t.a. filed a final accounting which was accepted by decree dated May 22, 1934, and the administrators c.t.a. were finally discharged as to all the assets set forth therein in accordance with the customary provisions of New York decrees on final accountings (30a,

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[2] Page references are to the pages of the printed record.

65a); thereafter no premiums were paid or demanded on the administrators' bond (30a).

Mary K. Gibran, individually, as next of kin, and the administrators c.t.a. each applied for and received separate certificates of registration of the renewal of the copyright on each of the works of Kahlil Gibran here involved during the statutory year in which each renewal could be obtained (20a, 30a-31a). These duplicate renewals were applied for to insure that the valuable properties involved did not pass into the public domain.

Kahlil Gibran and Alfred A. Knopf, Inc. had signed publishing contracts providing for the payment of royalties during the terms of the original copyrights and of the renewal copyrights on the author's books (20a). Mary K. Gibran in her individual capacity, and the administrators c.t.a. demanded that Alfred A. Knopf, Inc., pay the royalties accumulated on the renewal copyrights to them, as their interests may appear (6a). The publisher, conceding that these royalties were due someone, refused to honor such demand on the ground that there were others who claimed the renewal royalties (31a).

Thereafter, an action was instituted against Alfred A. Knopf, Inc. for payment of the accumulated renewal royalties (4a-6a). The publisher answered, admitted that the royalties had accumulated, and counterclaimed for interpleader of various other defendants. By order of the District Court, such interpleader was allowed, and the defendant was permitted to deposit in the Registry of the Court the renewal royalties and thereupon be discharged of all further liability for such royalties.

The interpleaded defendants were served by publication. The National Committee of Gibran, and the individuals who constituted that committee, appeared and answered, claiming the renewal royalties by virtue of the author's will:

The District Court held that the certificates of renewal of copyright obtained by the administrators c.t.a. were valid certificates and that no other renewal certificates were valid. That court went on to deny the petitioner's contention that the administrators were required to distribute the renewal copyrights, and the accumulated renewal royalties, to the petitioner. The Court of Appeals for the Second Circuit affirmed the District Court decision.

The jurisdiction of the United States District Court was predicated on 28 U. S. C. §§1331, 1338. The former section gives District Courts jurisdiction of an action arising under the laws of the United States. The statute here involved is 17 U. S. C. §§24 and 28. 28 U. S. C. §1338 gives District Courts jurisdiction of actions arising under the Copyright Laws of the United States.

Reasons for Granting the Writ of Certiorari

1. The Court of Appeals has decided important questions of federal law which have not been, but should be, settled by this Court. The court below has construed the Copyright Act in two important respects. Both of these raise questions of wide application which have not been determined by this Court. These questions are:

A. Whether an administrator c.t.a. has a right to obtain a certificate of renewal copyright; and

B. Whether an author may bequeath a renewal copyright not yet secured at the time of his death.

These are important questions of copyright law; they have very broad impact. The answers to them are important to authors, playwrights and composers of musical compositions, to their next of kin and legatees, as well as to publishers.

Situations where each of these questions are problems readily occur. As to the first, administrators c.t.a. are often appointed; their use is by no means limited to a situation where, as in the instant case, the will names no executor. Such an administrator comes into existence any time a named executor dies, fails to qualify, resigns, etc. and there is no successor named, or no named successor capable or desirous of acting.

If this Court now leaves open the question whether an administrator c.t.a. can renew, and, in a later case, ultimately determines that he cannot, then all renewal copyrights obtained by administrators c.t.a. in reliance on the decision below will be void and the works involved will be in the public domain. Clearly, for all next of kin and legatees of authors, composers, etc. and for publishers (where the author, etc., is not survived by a spouse or children and there is no executor during the renewal period), it is an important question of federal law whether an administrator c.t.a. can secure a renewal copyright.

With regard to the second question raised above—whether an author can bequeath a renewal copyright not yet secured—bequests by will are, needless to say, very frequent. Obviously, it is important for an author, composer, etc. to know whether he can make such a bequest (if he is not survived by a spouse or children); it is equally important for the next of kin, the legatees and publishers to know to whom renewal royalties belong.

2. The court below has decided a federal question in a way in conflict with an applicable decision of this Court, to wit, *Fred Fisher Music Co.* v. *Witmark & Sons*, 318 U. S. 643. The theory upon which the court below proceeded, i.e., that the author of a copyrighted work has complete power of disposition by will of a renewal copyright even though that renewal copyright is not to be

obtained until many years after the author's death, is completely contrary to the plain implications of the opinion of this Court in the *Witmark* case. In the latter case, this Court found that an author's rights with regard to a renewal copyright not yet obtained are limited because of the statutory scheme found in the Copyright Act. This Court held that the author's right to assign a renewal to be secured is conditioned upon the author's surviving until the year in which the renewal copyright can be obtained. The opinion of the court below in the instant case, on the contrary, found that, in one respect at least, an author's right with regard to a renewal copyright is not conditioned upon his survival until the year in which the renewal can be obtained; the court below found, instead, that the author may dispose by will of the renewal copyright even though he does not so survive.

The holding of this Court in the *Witmark* case and the holding of the lower court in the instant case are both predicated upon the language of, and the Congressional intent in enacting, Section 24 of the Copyright Act, i.e., the renewal provision of that act. Yet, in interpreting that section, the court below found that the disposition by an author of a renewal copyright to be obtained after his death is not conditioned upon the author's surviving until the renewal period, while the decision in the *Witmark* case is impliedly based upon a finding that the disposition by an author of a renewal copyright to be obtained after his death is conditioned upon the author's surviving until the renewal period. Accordingly, the decision of the court below conflicts with this Court's interpretation of the Copyright Act.

Furthermore, the decision below permitting a bequest of a copyright to be secured conflicts with the *Witmark* case in another respect. Logically, an author who may bequeath by will a renewal copyright to be secured may equally

effectively contract to bequeath it. Thus, the statute's carefully drawn provisions, heretofore held by this Court and others to prohibit anticipatory assignment, pledge or other invasion of a renewal copyright to be secured after the author's death can be completely frustrated. A publisher, in its contract with an author, need only include a provision that the author will bequeath the renewal copyright to the publisher. Then, if the author dies before the renewal period, the indirect assignment by the contract to bequeath would be valid, under the decision below, even if the author did not make a will, whereas a direct assignment of the renewal would be void.

In the light of this conflict with the prior decision of this Court, a writ of certiorari should be granted in order to correct the incorrect conclusion of the court below, particularly in view of the great importance of the issues involved.

3. The opinion of the Circuit Court is untenable inasmuch as it is contrary to the plain language of the Copyright Act, its purposes, and its statutory history. The court below held, first, that administrators c.t.a. have a right to obtain a certificate of renewal copyright, and, second, that authors not survived by a widow, widower, or children may bequeath renewal copyrights not yet secured at the time of the author's death.

A. In arriving at its decision that an administrator c.t.a. can obtain a certificate of renewal copyright, the court below plainly erred.

A consistent line of decisions has held a renewal copyright to be a "new estate" [*G. Ricordi & Co.* v. *Paramount Pictures*, 189 F. 2d 469, 471 (Ct. App., 2d), cert. den. 342 U. S. 849; *Southern Music Pub. Co.* v. *Bibo-Lang*, 10 F. Supp. 975 (D. C., S. D. N. Y.); *White-Smith Music Pub. Co.* v. *Goff*, 187 Fed. 247, 249 (Ct. App., 1st)], unrelated to

the original copyright, and governed entirely by statute. In the language of the Attorney General (28 Op. Atty. Gen. 162 [1910]):

> "The privileges of copyright are purely statutory, and when one seeks a renewal or extension of a copyright his right thereto must be found within the statute."

To the same effect are *Stuff* v. *La Budde Feed & Grain Co.*, 42 F. Supp. 493, 496, and *White-Smith Music Pub. Co.* v. *Goff*, 187 Fed. 247, 248-249.

Accordingly, the right to renew a copyright accrues to those persons, and only to those persons, specified in the pertinent provision of the statute, Section 24 of the Copyright Act, quoted above.

Excluded from the persons named in that Section of the Copyright Act is an administrator.

Not only does the statute make no provision for the renewal of a copyright by administrators, but the Report of the Committees reporting the bill shows that the omission was intentional. The Report said: "It was not the intention to permit the administrator to apply for the renewal, but to permit the author who had no wife or children to bequeath by will the right to apply for the renewal." (H. R. Rep. No. 2222, p. 14, 60th Cong., 2d Sess., adopted as the report of the Senate Committee on Patents, Sen. Rep. No. 1108.)

Accordingly, the exclusion of administrators from the statute renders them impotent to obtain a valid renewal. It was so stated in *White-Smith Music Pub. Co.* v. *Goff*, 187 Fed. 247, 249; *Silverman* v. *Sunrise Pictures Corp.*, 290 Fed. 804, cert. denied 262 U. S. 758; *Danks* v. *Gordon*, 272 Fed. 821. It matters not that the particular administrators

are administrators c.t.a. In two of the three cases cited just above (the *Silverman* and *Danks* cases), the court had before it an administrator c.t.a.

The court below presumably recognized the deliberate omission of administrators from the persons who may obtain renewal certificates. However, the court below based its decision on the fact that an administrator c.t.a. was involved here. The court below mistakenly assumed that the difference between an executor and an administrator c.t.a. is one of nomenclature. For the reasons hereafter set forth, the court below was wrong in that assumption.

A major difference in all the states between executors and administrators c.t.a. is the source from which the authority of each stems. An executor's authority derives directly from the testator through the will. An administrator's authority stems from the law of the state appointing him. For an executor, the effect of probate is to authenticate his already existing powers and title; an administrator has no powers and no title until he is appointed and has qualified, and then he has only those powers granted by the state appointing him. See *Helme* v. *Buckelew*, 229 N. Y. 363, 366 (Cardozo, *J.*); *Stacy* v. *Thrasher*, 6 How. 44, 58, 12 L. Ed. 337, 343; *Hill* v. *Tucker*, 13 How. 458, 466, 14 L. Ed. 223, 226; Warren's Heaton on Surrogate's Courts, Vol. 2, §193, ¶5.

In this respect, an administrator and an administrator c.t.a. are in the same position, deriving their authority from the appointing state. See *Casoni* v. *Jerome*, 58 N. Y. 315, 319; *Ex Parte Brown*, 2 Bradf. Surr. 22. In the former case, the court said (58 N. Y. 319, 320):

> "The statute defines the cases in which letters of administration may be issued, which include the issuing of letters of administration with the will an-

nexed, as also in case of general intestacy. *Whether the administration is general or special, the appointee has the same legal character, and is properly denominated an administrator.* In either case, he derives his title to the personal assets of the deceased solely from the appointment." (Italics supplied.)

Because of this difference in derivation of authority, a statute giving powers to administrators c.t.a. had to be enacted in New York (§225, N. Y. Surrogate's Court Act), but there is no similar statute with regard to executors.

There are other important distinctions between an administrator c.t.a. and an executor. Unless an executor is to hold or invest property for another, he need not file a bond except where the Surrogate specially requires it. (N. Y. Surr. Ct. Act, §§94, 97 and 169.) On the other hand, an administrator c.t.a. must, in all instances, file a bond before he can qualify (N. Y. Surr. Ct. Act, §§1, 35, 121).

Furthermore, an executor can, under the will, have powers, some of which cannot be exercised by an administrator c.t.a. replacing him. See Warren's Heaton Surrogate's Courts, Vol. 2, §197, ¶2(c). Holding to this effect are *Bain* v. *Matteson*, 54 N. Y. 663, 667; *Mott* v. *Ackerman*, 92 N. Y. 539, 553; *Greenland* v. *Waddell*, 116 N. Y. 234, 240; *Matter of Baker*, 26 Hun 626.

Although the situation no longer obtains because of the specific statutory grant of power with regard to real estate added in 1914, prior thereto a discretionary power of sale of real estate given to an executor in a will did not pass to an administrator c.t.a. *Hollenbach* v. *Born*, 238 N. Y. 34, 36. (See §2613, N. Y. Code of Civil Procedure, renumbered §2695 by the revision of 1914 and now §225 of the N. Y. Surr. Ct. Act.) Surely it cannot be said that, because of this major difference in the powers of an executor and an

administrator c.t.a. which then prevailed, prior to 1914 an administrator c.t.a. was not the same as an executor and could not renew a copyright, but now can do so.

In many states outside of New York, there are important differences between an executor and an administrator c.t.a. For example, in Tennessee, it has been held (*McElroy* v. *McElroy*, 110 Tenn. 137) that when a will gives a power of sale of real property, but names no executor, a sale of the real property by the administrator c.t.a. is invalid without prior court approval. This was held even though the applicable Tennessee statute cited by the court provided that "all administrators with the will annexed, shall have the same power and authority as the executor had by the will of the testator" (110 Tenn. at 143). In New Jersey (N. J. S. A. 3A:16-12) and in Washington (Rev. Code of Wash., Title 11, Ch. 11.28.070) an administrator c.t.a. cannot sell or mortgage real property without court approval, while there is no such requirement for an executor. Pennsylvania requires that an administrator c.t.a. may be required to file an additional bond before he may receive the proceeds of a sale of real property (20 Pa. Stats. Ann. §320.516). Again, several states provide by statute, what New York cases hold (*supra*, p. 12), that an administrator c.t.a. does not acquire the personal or discretionary powers given the executor in the will (see, e.g., Indiana Probate Code, §7-408; Code of Georgia, Title 113, §1502; Calif. Probate Code §409; Arkansas Stats., Title 62, §2205).

Furthermore, one jurisdiction will not acknowledge, nor impose a duty upon, an administrator appointed in another jurisdiction, although it will do so with regard to an executor. Compare *Carpenter* v. *Strange*, 141 U. S. 87, 35 L. Ed. 640, which holds that a judgment against an executor in one state can be sued upon in another, with *Stacy* v. *Thrasher*, 6 How. 44, 12 L. Ed. 337, which holds that a

judgment against an administrator in one state cannot be sued upon in another. Since the rationale of the latter case is that the administrator obtains his power from the state, and not from the will, the decision would apply equally to an administrator c.t.a. who also obtains his power from the state.

Thus it has been shown that in instances completely outside the Copyright Act, the distinction between executors and administrators c.t.a. has been recognized as fundamental. And, prior to the instant litigation, the courts have without exception felt that administrators, whether or not appointed with the will annexed, were excluded from exercise of the right of renewal of copyright. To reach the decision it did, the court below had to depart from its own holdings. In two prior cases in the Second Circuit, *Danks* v. *Gordon*, 272 Fed. 821, and *Silverman* v. *Sunrise Pictures Corp.*, 290 Fed. 804, cert. den. 262 U. S. 758, that court was presented with instances where administrators c.t.a. were involved. In both, the court said that administrators c.t.a. are excluded from obtaining certificates of renewal copyright.

It should be here noted that the court below was in error in stating that its decisions in the *Silverman* cases (*Silverman* v. *Sunrise Pictures Corp.*, 273 Fed. 909, and *Silverman* v. *Sunrise Pictures Corp.*, 290 Fed. 804, cert. den. 262 U. S. 758) contained only dicta as to the power of an administrator c.t.a. to renew a copyright. On the contrary, the statement in the *Silverman* case that an administrator c.t.a. cannot renew, was the essence of the holding. The lower court had denied an injunction to the plaintiff on the ground that the renewal should have been made by an administrator c.t.a. and not by the next of kin (unreported opinion). The Circuit Court of Appeals reversed, and necessarily held to the contrary. Further, the legatees and

next of kin were not identical. Under the will, the widow (who was not next of kin) of a deceased brother, as well as the next of kin, would have shared in the renewal royalties had an administrator c.t.a. been found to have had the right to renew; in upholding the renewal by two of the next of kin, on behalf of all the next of kin, the aforesaid widow received no share.

Clearly, the court below erred in its attempted distinction of the *Silverman* case. In that case unquestionably there was a will, and yet the next of kin were held to be entitled to renew. In the instant case, the court below declares that because there is a will, the next of kin cannot renew.

For all these reasons the court below improperly held that an administrator c.t.a. can obtain a certificate of renewal copyright.

B. The Court of Appeals did not discuss the question of the right to bequeath a renewal copyright to be secured; it merely affirmed the District Court on that question. The District Court, in turn, had erroneously concluded that such a renewal copyright—i.e., a renewal copyright to be secured after the death of the author—could be bequeathed by will, based on the language of §28 of the Copyright Act. That section permits bequests of a copyright "secured under this title." The District Court construed this phrase to include "renewal as well as original copyrights" (16a).

But this begs the question. Petitioner does not contend that if the author has himself obtained the renewal copyright he cannot bequeath it. The question is whether an author can bequeath a renewal copyright not in existence when he dies, and which may, by statute, be obtained only after his death. Nothing in the Copyright Act permits him to do so. Section 28 does not say that a copyright secured *or to be secured* under this title may be bequeathed by will. It uses only the past tense, "secured." Plainly, it means

that copyrights "secured" at the time the will becomes effective can be bequeathed, and nothing more.

Further, the District Court was wrong in construing Section 28 to permit an author to bequeath renewal copyrights to be secured after his death, inasmuch as such a construction conflicts with Section 24 of the Act.

Section 24 flatly bars an author with a surviving spouse from bequeathing renewals to be secured after he dies. But if the District Court is correct in finding that Section 28 authorizes bequests of renewal copyrights to be secured after an author's death, necessarily that section would permit an author to bequeath such a renewal copyright despite the survival of his widow or children. The language of Section 28 contains no exceptions to cover the situation where a spouse or children survive. It states only that copyrights secured under the Act may be bequeathed. If this language includes copyrights to be secured after the author's death, then an author could bequeath them to anyone, even if a spouse and children survive. But clearly Section 24 prohibits him from so doing. To avoid conflict between Sections 24 and 28, Section 28 cannot be construed to permit bequests of renewals to be secured after an author's death. And the obvious meaning of the language of Section 28 in fact requires such a non-conflicting construction. Section 28 on its face authorizes bequests only of renewal copyrights *secured* by the author; it does not apply to, and was not intended to apply to renewals to be secured after the author's death. Only Section 24 covers renewals to be secured after the author's death, and that section contains no provision giving a right to bequeath similar to that in Section 28.

The only language in Section 24 that in any way bears upon the right to bequeath the privilege of renewal is that portion of the section which provides that in certain cir-

cumstances the executors of an author are entitled to a renewal and extension of the copyright. The committee report accompanying the revision of the Copyright Act in 1909, demonstrates that Congress was not, by that language of the Copyright Act, giving to the author the right to designate legatees of the renewals when obtained. "It was not the intention to permit the administrator to apply for the renewal, but to permit the author who had no wife or children to bequeath by will *the right to apply for* the renewal." (Italics supplied.) (H. R. Report No. 2222, 60th Cong. 2d Sess., Sen. Rep. No. 1108, p. 14.) Thus, Congress gave the author only the right to name the person, i.e., an executor, who would apply for the renewal. The executor's disposition of a renewal copyright obtained after the author's death was not left to the author to determine, any more than the disposition of a renewal obtained after his death was left to the author to determine if the author's spouse or children survived him. The Committee report did not say that the intent was to permit the author to bequeath the renewal; on the contrary, the only intent was to permit the author to name the person who could "apply for" the renewal. To this effect, see Ball, "*Law of Copyright and Literary Property*" (p. 201):

> "If the author is not survived by a spouse or child, the right of renewal, if the author died testate, may be exercised by the executors of his will who would take the renewal copyright *in trust for the next of kin* * * *" (Italics supplied.)

Accordingly, the District Court had no basis for finding a "congressional purpose" to permit an author, not survived by a spouse or children, to bequeath renewals to be secured after death. No such purpose is evident.

On the contrary, there appears an evident Congressional intent severely to limit an author's rights as to renewal

copyrights which have not yet matured. Plainly, Congress did not consider such renewal rights (i.e., the right to apply for renewal after the author's death) in the same category as other property of the author. Thus, if an author dies before the renewal is applied for, leaving a widow or children, his will cannot affect the right to renew his copyrights. 17 U. S. C. §24. Or, if an author dies before the 28th year of his copyright, any assignment of the renewal copyrights he has previously made is ineffective. *Miller Music Corp.* v. *Charles N. Daniels, Inc.*, 158 F. Supp. 188; cf. *M. Witmark & Sons* v. *Fred Fisher Music Co.*, 125 F. 2d 949, 950, aff'd 318 U. S. 643; *Fox Film Corp.* v. *Knowles*, 261 U. S. 326; *Tobani* v. *Carl Fischer Inc.*, 263 App. Div. 503, aff'd 289 N. Y. 727; *Fitch* v. *Shubert*, 20 F. Supp. 314 (S. D. N. Y.).

Further evidence of the actual lack of such a Congressional purpose is found in the fact that the statute does not permit renewal copyrights which mature after the author's death to become a normal part of the author's estate. It set up its own scheme of distribution. "The statute is peculiar, in that it does not provide that in case of the decease of the author the renewal right shall follow the ordinary rules of law in case of testacy or intestacy, but designates beneficiaries who take the right directly from the statute." (*White-Smith Music Pub. Co.* v. *Goff*, 180 Fed. 256, 258, aff'd 187 Fed. 247.) Congress intended to and did establish its own distributive setup. Ball, *Law of Copyright and Literary Property* (p. 204), states it thus: " * * * it is clear that the right of renewal does not follow the author's estate, but that the renewal right is derived directly from the statute." The right of renewal arising after an author's death and the resulting renewed copyrights may therefore more properly be regarded solely as statutory benefits accruing to designated persons who bear the specified relationships to the author.

Against such a background of established and recognized restriction and limitation, and read in conjunction with the Congressional report stating only that the author could bequeath by will "the right *to apply for* renewal" when not survived by a widow or children, it is correct to read the language of Section 28 of the Copyright Act as applying only to renewals secured before the author's death. Such a construction, contrary to the opinions of the courts below, does not defeat the intent and purpose of Congress. On the contrary, it is plain that Congress wanted the author's right to affect renewal copyrights obtained after the author's death strictly limited; the position here urged accords with that intent. The court below erred in holding to the contrary.

CONCLUSION

There are two major questions of federal law involved here, which have not been resolved by this Court and should be resolved by it. The decision of the court below is in conflict with a decision of this Court, and with prior decisions in the same circuit. The decision of the court below is clearly wrong. For these reasons, a writ of certiorari should be granted.

Respectfully submitted,

VICTOR HOUSE
Attorney for Petitioner

APPENDIX

Opinion Dated April 25, 1958

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 280—October Term, 1957.

(Argued March 27, 1958 Decided April 25, 1958.)

Docket No. 24904

MARY K. GIBRAN and WILLIAM SAXE, Administrators c.t.a. of the Estate of KAHLIL GIBRAN,

Appellees,

—v.—

NATIONAL COMMITTEE OF GIBRAN,

Appellant.

Before:

CLARK, *Chief Judge,*
HAND and LUMBARD, *Circuit Judges.*

On appeals from a judgment of the District Court for the Southern District of New York (Weinfeld, *J.*, presiding), 153 F. Supp. 854, granting royalties accruing upon copyright renewals to the administrators of the deceased author.

VICTOR HOUSE *for Mary K. Gibran.*

IRVING M. GRUBER *for Administrators.*

RALPH L. KNISLEY *for National Committee of Gibran.*

Opinion Dated April 25, 1958

HAND, *Circuit Judge*:

This case arises on two appeals from a judgment of Weinfeld, *J.*, awarding to the plaintiffs, as administrators c.t.a., of Kahlil Gibran, royalties accruing upon renewals, applied for after his death, of unexpired copyrights in a number of books written by him. Mary K. Gibran appeals individually from the judgment because she claims title to the renewals. The National Committee of Gibran appeals from so much of the judgment as directs the royalties falling due upon the renewals to be paid to the administrators for distribution in accordance with the will of the decedent. Judge Weinfeld stated the undisputed facts on pages 856 and 857 of his opinion (152 F. Supp. 854) as follows, which we adopt.

"Gibran died in April, 1931. He left no widow or children surviving him. His sole surviving next of kin was his sister, the individual plaintiff in this action. Gibran drafted his own will without the aid of legal advice. No executor was named. The will was duly admitted to probate in May, 1931 and shortly thereafter letters of administration c.t.a. were issued by the Surrogate's Court, New York County, to Mary K. Gibran, his sister, and William Saxe, who are the co-plaintiffs in this action. The letters of administration c.t.a. have not been revoked.

"The will contains the following provision: 'The royalties on my copyrights, which copyrights I understand can be extended upon request by my heirs for an additional period of twenty-eight years after my death, are to go to my home town,' elsewhere referred to in the will as 'Bechari, Republic of Lebanon.'

"The defendant, the National Committee of Gibran, was organized by the town of Bechari for the purpose of re-

ceiving royalties payable to it under the will. The defendant publisher has paid all royalties under the original copyright which accrued after the death of Gibran to the Committee and its predecessor. These were paid following the construction of the will by the Surrogate's Court, New York County, that 'the gift of the royalties on the copyrights contained in the fourth paragraph of the said last will and testament carries with it the gift of the copyrights to the town of Bechari.' No issue exists as to the payments so made under the original copyrights. But controversy does exist with respect to the renewal copyrights.

* * * * *

"As already noted, Gibran did not name an executor in his will. Accordingly, in the 28th year of the respective original copyrights, both the plaintiff administrators c.t.a. and the individual plaintiff, Gibran, the author's sole next of kin, duly filed applications for renewals of the copyrights of the five works and duplicate certificates of copyright registration were issued to them respectively. In so renewing the copyrights they apparently acted in mutual self-interest to avoid a lapse of the renewal rights, whether ultimately the benefits thereof were to accrue to the next of kin, or the distributee, if any, under the will."

The question as to who is entitled to the renewal of a copyright has been mooted ever since the Act of 1831 (Ch. 16, 4 Stat. L. 436, 439). Originally the statute of 1790 (Ch. 15, Stat. L. 124) gave the "extension" to "executors, administrators or assigns" of the first owner; and in *Paige v. Banks*, 13 Wall. 608, the Supreme Court held, as to a copyright that had been taken out before 1831 but had been renewed thereafter, that the old act controlled and that the assignee of the original copyright was entitled to the renewal. This decision the First Circuit considered in

White-Smith Music Publishing Co. v. *Goff*, 187 Fed. Rep. 247, where it held that, except in the case of a "composite work," the right of renewal is vested in those named in the second proviso of §24 of Title 17, U. S. C. among whom was not an "administrator" (p. 253), since that would make the right a part of the original author's estate. We followed this ruling in *Danks* v. *Gordon*, 272 Fed. Rep. 821, 825, and in *Silverman* v. *Sunrise Pictures Corporation*, 273 Fed. Rep. 909, we held that when two of the three next of kin applied for a renewal within the year before the copyright had expired the renewal was good, although the author had made a will and appointed executors who had not applied for renewal within the year. An administrator c.t.a. had been later appointed in that case after the executors had accounted and been discharged, and he had also applied for a renewal, though too late, as we have said. We held that the executors had the right to renew only in case the author had died during the year before the expiration of the copyright (p. 913), and that otherwise the privilege of renewal vested in the next of kin. Our statement that an administrator c.t.a. may never apply for renewal was therefore in any event superfluous, because his application was too late. What we held as to the nature of the executor's privilege was overruled by the Supreme Court in *Fox Film Corp.* v. *Knowles*, 261 U. S. 326, but, when the *Silverman* case came before us again in 290 Fed. Rep. 804, we reaffirmed our original disposition of the dispute, because the next of kin had the power to apply for the renewal. We also repeated what we said about the power of an administrator c.t.a. but again that was not necessary to the result, for the reason we have just mentioned.

Opinion Dated April 25, 1958

Therefore, we feel free to consider the question as a new one and we agree with Judge Weinfeld that §24 gives the power to the administrator c.t.a., at least in cases where the author has made a will but has not appointed any executor. Were this not true, there would be no one, as the section reads, who could exercise the power at all; there would be no executor and yet there would not be the "absence of a will," which is an express condition on the privilege of the next of kin. Section 225 of the New York Surrogate's Court Act defines the powers of an administrator c.t.a. as follows: "Where letters of administration with the will annexed are granted, the will of the deceased shall be observed and performed; and the administrators with such will have the rights and powers, and are subject to the same duties, as if they had been named as executors in the will." This language leaves no doubt that whatever would have been the power of an executor, if Gibran had named one, the plaintiffs succeeded to them. Compare *Hollenbach v. Born*, 238 N. Y. 34. Judge Weinfeld was plainly right in holding that the plaintiffs had the power and indeed the duty to renew the copyrights and to hold them for the benefit of the testator's "home town."

We also agree with that part of the judgment that "the balance of the funds on deposit in the Registry * * * be paid over to the administrators c.t.a. * * * for distribution to the National Committee * * * and further that the administrators c.t.a. shall assign the renewals to said Committee, all subject to an accounting in the Surrogate's Court."

Judgment affirmed.

Order

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 25th day of April one thousand nine hundred and fifty-eight.

Present:

HON. CHARLES E. CLARK,
Chief Judge.

HON. LEARNED HAND,

HON. J. EDWARD LUMBARD,
Circuit Judges.

MARY K. GIBRAN and WILLIAM SAXE as Administrators c.t.a. of the Estate of KAHLIL GIBRAN and MARY K. GIBRAN,
Plaintiffs-Appellants.

—v.—

ALFRED A. KNOPF, INCORPORATED,
Defendant-Appellee.

THE NATIONAL COMMITTEE OF GIBRAN, *et al.*,
Interpleaded Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

Order

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. Daniel Fusaro
Clerk

AUG 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 204

MARY K. GIBRAN, as sole heir and next of kin of KAHLIL GIBRAN,

Petitioner,

v.

THE NATIONAL COMMITTEE OF GIBRAN,

Respondent,

and

MARY K. GIBRAN and WILLIAM SAXE, as Administrators c.t.a. of the Estate of KAHLIL GIBRAN,

Respondents.

BRIEF OF RESPONDENT, THE NATIONAL COMMITTEE OF GIBRAN, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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RALPH L. KNISLEY,
On the Brief.

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MARY K. GIBRAN and WILLIAM SAXE, as Administrators c.t.a. of the Estate of KAHLIL GIBRAN,

Respondents.

BRIEF OF RESPONDENT, THE NATIONAL COMMITTEE OF GIBRAN, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement.

The author of the copyrighted works involved in this litigation died a resident of New York in the year 1931, leaving no wife, children or other descendants surviving him. He left a will which was duly probated in the Surrogate's Court of New York County. Because the will failed to designate an executor, the Surrogate's Court, on

or about June 4, 1931, granted Letters of Administration with the will annexed to Mary K. Gibran and William Saxe to carry out the deceased author's testamentary directions (29a).[1] Their appointment as such has never been revoked (30a) and they are still in office (4a, 25a).

During the last year of the original copyright term of each of the books, application for renewal was filed by the administrators c.t.a. and also by Mary K. Gibran, individually, claiming as sole next of kin, and duplicate certificates of copyright registration were issued by the Register of Copyrights (20a-21a).

The District Court determined that the right of renewal was vested in the administrators c.t.a. (15a) and that only the certificates of renewal copyright registration issued to the administrators c.t.a. are valid (24a). The opinion of the District Court states, "I hold that although the statute refers to 'the author's executors,' an administrator c.t.a. appointed to enforce and administer the provisions of an author's will which has been admitted to probate, stands in the shoes of an executor and as such is entitled to exercise the right of renewal of the copyright" (11a).

That Court further determined that the author's will bequeathed the royalties on the renewal copyrights to the decedent's home town of Bechari, Lebanon, represented herein by The National Committee of Gibran (17a, 25a), and directed that the accumulated renewal royalties then on deposit in the Registry of the Court be paid over by the Clerk of the Court to the administrators c.t.a. for distribution to the Committee and that the administrators c.t.a. assign the copyright renewals to the Committee, all subject to an accounting in the Surrogate's Court of New York County (25a).

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[1] Page references are to the pages of the printed record.

The Court of Appeals for the Second Circuit affirmed the judgment of the District Court (Appendix to Petition, 21-25).

Reasons for Denying Writ of Certiorari.

The right of copyright renewal is given by the statute (Sec. 24, Copyright Act) to the persons mentioned and in the order of preference named therein. *Fox Film Corp.* v. *Knowles,* 261 U. S. 326.

Under the statute, if an author dies prior to the renewal year, survived by no spouse or children, and leaves a will, the author's executors are the proper persons to apply for renewal. The executors have the same power to apply for renewal that the author himself would have if living, and next of kin are excluded. *Fox Film Corp.* v. *Knowles, supra.*

If the author fails to make a will the renewal right passes to his next of kin. The statute is specific in this respect. Only "in the absence of a will" are next of kin entitled to renewal.

In the instant case the author was survived by no widow or children, and he left a will which bequeathed all copyright royalties, renewal as well as original, to a named beneficiary. His failure to name an executor to carry out the terms of the will is quite understandable when it is considered that he drafted the will himself without the aid of legal advice (29a) and obviously did not appreciate its importance or desirability. Hence administrators with the will annexed were appointed.

It is customary for a will to designate an executor to administer the estate. This is obviously the reason the statute employs the word "executors". But there is no essential difference between an executor and an adminis-

trator c. t. a. For all practical purposes they are identical. If no person is named as executor in a will, or if at any time, for any reason, during the administration of the estate there is no executor qualified to act, the Surrogate's Court must, upon application of any person interested in the estate, appoint an administrator with the will annexed (N. Y. Surr. Ct. Act. Sec. 133).

And when letters of administration c. t. a. are granted, the will of the decedent must be observed and performed; and the administrators c.t.a. have the same rights and powers, and are subject to the same duties, as if they had been *named as executors in the will* (N. Y. Surr. Ct. Act, Sec. 225). (Emphasis supplied.) See also 34 C. J. S., Sec. 1034a.

The distinction between an administrator c.t.a. and an ordinary administrator is that the administrator c.t.a. must look to the will for directions in the management and distribution of the estate, whereas the administrator of an intestate's estate distributes the net assets according to the statute of distribution (*Casoni* v. *Jerome*, 58 N. Y. 315, 320).

In a previous case (*Silverman* v. *Sunrise Pictures Corp.*, 273 Fed. 909, and 290 Fed. 804, cert. den. 262 U. S. 758) the Court below had remarked that the right of renewal cannot be exercised by an administrator c.t.a. It now concedes its statements to that effect were dicta. The administrator c.t.a. in the *Silverman* case was not appointed until years after the renewal period had expired, and therefore the right of renewal by an administrator c.t.a. was not in issue. The surviving executor had rendered his final account and was "fully and finally discharged" and was *functus officio* several years before the statutory renewal year. The conclusion of the Court that, upon the facts of that case, the right of renewal vested in the next of kin was clearly predi-

cated upon its holding that, under Alabama law, when an executor "fully and finally" accounts he is "discharged from office" and thereafter possesses no executorial powers.

Under New York law an executor is not "finally discharged" when a decree is entered upon the judicial settlement of his account. He is discharged from further liability as to all matters embraced in his account and the decree. But the executorial functions are not absolutely terminated thereby in the sense that the executor becomes non-existent. An executor is discharged *pro tanto*. Assets may be subsequently realized and new liabilities incurred, and as to those the executorial duty continues. *Mahoney* v. *Bernhard*, 45 App. Div. 499, 501-2, affd. 169 N. Y. 589; *Joseph* v. *Herzig*, 198 N. Y. 456, 461; N. Y. Surr. Ct. Act, Sec. 274. The same is true with respect to administrators c.t.a. (N. Y. Surr. Ct. Act, Sec. 225).

The decision of the Court below in the present case in no way conflicts with the decision of this Court in *Fred Fisher Music Co.* v. *Witmark & Sons*, 318 U. S. 643, as claimed by the petitioner. The sole question before the Court in the *Witmark* case was whether the Copyright Act itself nullifies *an agreement* by an author, made during the original copyright term, *to assign* his renewal. It was held that such an agreement is valid and enforceable. The agreement to assign the renewal created only an expectancy which depended upon the author's survival until at least the first day of the twenty-eighth year of the original copyright term. The author had agreed to assign his renewal after he had secured it. His right to renew necessarily depended upon his survival to the renewal year. The agreement to assign, and the premature assignment itself, would not have cut off the rights of renewal extended to widow, children, executors, or next of kin, if the author had died prior to the renewal period.

The *Witmark* case concerned the disposition of the renewal copyright after the author himself had secured the renewal in his lifetime. Having survived until the renewal period the author alone had the right to apply for renewal.

The present case concerns the disposition of renewal copyrights by the will of an author, the right to apply for renewal being conferred upon his "executors" (administrators c. t. a.). The right of renewal granted by the statute to "executors" assumes the death of the author prior to the renewal period. The legatee had only an expectancy during the author's lifetime which depended upon the author's death prior to the renewal year leaving no widow or children.

Sections 24 and 28 of the Copyright Act, read together, clearly give to an author who is survived by no spouse or children the right to bequeath by will his copyright renewals.

When an executor or an administrator c. t. a. exercises the renewal privilege, he does so in his representative capacity for the benefit of the person or persons entitled to receive under the terms of the will. *Silverman* v. *Sunrise Pictures Corp.*, 273 Fed. 909, at 912-913.

Conclusion.

The decision of the Court below is clearly sound. That decision in no way conflicts with any decision of this Court. The questions decided below are not of sufficient importance to warrant review by this Court. For these reasons a writ of certiorari should be denied.

Respectfully submitted,

GEORGE G. SHIYA,
Attorney for Respondent,
The National Committee of Gibran.

RALPH L. KNISLEY,
On the Brief.